THE GREAT EASTERN LIFE ASSURANCE CO LTD

v.

INDRA JANARDHANA MENON

FEDERAL COURT, PUTRAJAYA
SITI NORMA YAAKOB CJ (MALAYA)
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL HAMID MOHAMAD FCJ
[CIVIL SUIT NO: 02-3-2005 (W)]
18 NOVEMBER 2005

LIMITATION: *Accrual of cause of action - Contract - Breach - Running of time - Whether disparate obligations to pay from time to time can be construed as a single continuing obligation so as to circumvent s. 6(1)(a) Limitation Act 1953 - Whether provisions of Limitation Act cease to apply to a breach of contract if parties remain in contractual relationship*

CONTRACT: *Agency - Insurance agent's commission - Overriding commission - Whether company's obligation to pay overriding commission a single continuing obligation - Obligation to pay, when arose and when breached - Limitation Act 1953, s. 6(1)(a)*

The defendant/appellant (an insurance company) was sued by the plaintiff/respondent (an insurance agent and sales officer) for overriding commission arising from the sale of a group insurance scheme made in 1986 by another agent ('the sub-agent') whom the plaintiff had introduced to the defendant. (Subsequently, the plaintiff passed away and he was substituted by his daughter as a party to the suit.)

The High Court dismissed the plaintiff's suit on the following grounds, namely that: (i) the claim for overriding commission for the period before 8 April 1987 was time barred since the plaintiff's suit was filed on 8 April 1993; (ii) even if such claim was not time barred, there was no provision for overriding commission in the Agency Agreement or the Supplementary Agreement; (iii) the claim for overriding commission for the period after 8 April 1987 was unsustainable as the plaintiff did not assist the sub-agent in securing or servicing the group schemes procured by the sub-agent; and (iv) there was no breach of contract on the part of the defendant.

The Court of Appeal, however, allowed the plaintiff's appeal and reversed the decision of the High Court on the following grounds, namely that: (i) the plaintiff was entitled to claim overriding commission under Circular No. 2/1987/GIS(GS) ('the Circular') issued pursuant to, and forming part of, the Agency Agreement; and (ii) the claim was not time barred by s. 6(1)(a) Limitation Act 1953 ('the Act').

The two questions of law upon which the defendant was granted leave to appeal by the Federal Court were: (i) whether disparate obligations to pay from time to time – arising upon the occurrence/fulfilment of contingent events – can be construed as a single continuing obligation so as to displace the effect of s. 6(1)(a) of the Act; and (ii) whether the provisions of the Act cease to apply to a breach of contract where the parties remain in contractual relationship.

Held (allowing the defendant's appeal)

Per Siti Norma Yaakob CJ (Malaya) delivering the judgment of the Federal Court:

[1] The Court of Appeal was correct in holding that the plaintiff was entitled, as a divisional sales officer, to claim overriding commission for the sale of the said group scheme made by the sub-agent on the basis of para. II(A)(i) of the Circular. (p 723 a)

[2] There was, however, no evidence to support the Court of Appeal's conclusion that it was the parties' intention that the defendant's contractual obligation to pay overriding commission would be a continuous one. (pp 723 g-h, 724 a-b & 725 e-h)

[2a] A cause of action founded on contract accrues on the date of the breach, and time begins to run from that date. In the instant case, the plaintiff's cause of action arose when the defendant breached its obligation to pay the plaintiff his overriding commission. This happened in 1986 when the defendant refused to accede to the plaintiff's request to be paid his overriding commission for the sale made by the sub-agent. It was at that point that time began to run. The plaintiff's suit which was filed in 1993 was, therefore, time barred. (pp 724 c-h & 726 a-b)

[3] The Court of Appeal also failed to consider that the Circular only came into effect on 1 January 1987 whilst the sale of the group scheme made by the sub-agent was in 1986. (p 726 b)

[Both questions of law answered in the negative.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Defendan/perayu (sebuah syarikat insuran) telah didakwa oleh plaintif/responden (agen insuran dan pegawai jualan) berhubung komisyen bertindih yang berbangkit dari penjualan suatu skim insuran kumpulan yang dibuat oleh seorang agen lain ('sub-agen') yang diperkenalkan oleh plaintif kepada defendan. (plaintif kemudian meninggal dunia dan beliau diganti oleh anak perempuannya sebagai pihak kepada guaman).

Mahkamah Tinggi menolak tuntutan plaintif atas alasan-alasan berikut, iaitu, bahawa: (i) tuntutan komisyen bertindih bagi tempoh 8 April 1987 telah dihalangi had masa oleh kerana tuntutan plaintif telah difailkan pada 8 April 1993; (ii) jikapun tuntutan tidak dihalangi had masa, tidak ada peruntukan mengenai komisyen bertindih dalam Perjanjian Agensi atau Perjanjian Tambahan; (iii) tuntutan komisyen bertindih bagi tempoh selepas 8 April 1987 tidak boleh dipertahankan kerana plaintif tidak membantu sub-agen dalam memperoleh skim kumpulan tersebut atau memberi khidmat nasihat kepadanya; dan (iv) tiada perlanggaran kontrak di pihak defendan.

Mahkamah Rayuan, bagaimanapun, membenarkan rayuan plaintif dan mengakas keputusan Mahkamah Tinggi atas alasan-alasan bahawa: (i) plaintif berhak untuk menuntut komisyen bertindih di bawah Pekeliling No. 2/1987/GIS (GS) ('Pekeliling') yang dikeluarkan berdasarkan Perjanjian Agensi dan menjadi sebahagian darinya; dan (ii) tuntutan tidak dihalangi had masa di bawah s. 6(1) Akta Had Masa 1953 ('Akta').

Persoalan undang-undang bersandarkan mana defendan telah diberi kebenaran untuk merayu oleh Mahkamah Persekutuan adalah: (i) sama ada obligasi untuk membayar yang tidak selari dari masa ke semasa – yang berbangkit dari berlaku/tertunainya suatu kejadian yang disyaratkan – boleh ditafsirkan sebagai suatu obligasi tunggal yang berterusan sekaligus mengenepikan kesan s. 6(1) Akta; dan (ii) sama ada peruntukan-peruntukan Akta tidak lagi terpakai kepada suatu perlanggaran kontrak di mana pihak-pihak masih berada dalam hubungan kontraktual.

Diputuskan (membenarkan rayuan defendan)
Oleh Siti Norma Yaakob HB (Malaya) menyampaikan penghakiman Mahkamah Persekutuan:

[1] Mahkamah Rayuan betul apabila memutuskan bahawa plaintif, selaku seorang pegawai jualan bahagian, berhak untuk membuat tuntutan bertindih bagi jualan skim kumpulan yang dicapai oleh sub-agen tersebut berdasarkan perenggan II(A) Pekeliling.

[2] Bagaimanapun, tiada keterangan yang menyokong dapatan Mahkamah Rayuan bahawa adalah menjadi niat pihak-pihak bahawa obligasi kontraktual defendan untuk membayar komisyen bertindih adalah sesuatu yang berterusan.

[2a] Suatu kausa tindakan yang berasas kepada kontrak berbangkit pada tarikh kemungkiran, dan masa mula berjalan dari tarikh tersebut. Dalam kes semasa, kausa tindakan plaintif berbangkit apabila defendan memungkiri obligasinya untuk membayar komisyen bertindih plaintif. Ini berlaku pada tahun 1986 apabila defendan enggan memenuhi permintaan plaintif supaya komisyen bertindihnya dibayar bagi jualan yang dibuat oleh sub-agen. Itulah waktu dan ketikanya masa mula berjalan. Dengan itu, tuntutan plaintif, yang difailkan pada tahun 1993, telah dihalang oleh had masa.

[3] Mahkamah Rayuan juga gagal mempertimbang bahawa Pekeliling hanya mula berkuatkausa pada 1 Januari 1987, sementara jualan yang dibuat oleh sub-agen adalah pada tahun 1986.

[Kedua-dua persoalan undang-undang dijawab secara negatif]

Case(s) referred to:
Board of Trade v. Cayzer, Irvine & Co [1972] AC 610 ***(refd)***
Loh Wai Lian v. SEA Park Housing Corporation Sdn Bhd [1987] 2 MLJ 1 ***(dist)***

Legislation referred to:
Limitation Act 1953, s. 6(1)(a)

For the appellant - Nallini Pathmanathan (Ezane Chong with her); M/s Skrine & Co
For the respondent - K Siva Segara; M/s Siva Segara & Co

Reported by Gan Peng Chiang

JUDGMENT

Siti Norma Yaakob CJ (Malaya):
The initial proceedings in this appeal were commenced by one NVJ Menon ("Menon") since deceased, who sued the appellant for commissions due to him from the sale of a group insurance scheme by an agent introduced by him to the appellant. When he died on 26 November, 2002, his daughter, the respondent before us, was substituted a party in the proceedings and she continued the action on behalf of his estate.

Menon was also an agent of the appellant having joined the appellant as long ago as 1965 and he rose to the level of a Divisional Sales Officer within the appellant's heiraracy. In both capacities he earned commissions from the life insurance policies he sold for the appellant and he was also entitled to overriding commission in respect of sales of group insurance schemes made by agents introduced by him to the appellant. It is in respect of this overriding commission that the instant appeal is founded.

It is not disputed that Menon executed a number of agency agreements to regulate his relationship with the appellant and at the material time the following three contracts are most relevant.

(1) The Agency Agreement dated 8 July 1986, and the Schedule of Commissions attached to it which regulates Menon's entitlement to commissions as an agent.

(2) The Supplementary Agreement also dated 8 July 1986, containing terms and conditions relating to Menon's appointment as a Divisional Sales Officer ("DSO") and attached to it is the Schedule of Remuneration identifying the different types of commission that Menon was entitled to as a DSO.

(3) The Circular No. 2/1987/GIS (GS) dated 27 October 1987, regulating Menon's entitlement to overriding commissions on group insurance schemes effective from 1 January 1987. This Circular was issued pursuant to cl. 18 of the Agency Agreement and formed part of the latter.

During his agency with the Appellant, Menon recruited a number of subordinate agents in his unit. One of them was Indrani Subramaniam ("Indrani") whom Menon recruited in 1984.

In 1986, Indrani procured a group insurance scheme for the appellant and it is in respect of the overriding commission payable that Menon had made a claim on the appellant, which denied liability on the ground that the entitlement under the Circular had not become due. This is so as the Circular specifying the entitlement became effective only on 1 January 1987 and that claims before that date did not qualify. Since Indrani procured the group insurance scheme in 1986, the appellant refused payment and this was formally indicated by its letter dated 16 July 1990.

Menon filed a suit against the appellant on 8 April 1993, pleading a number of prayers but at the hearing confined them to a declaration that he was entitled to the full benefit of all the business conducted by Indrani ie, payment of overriding commission as well as an account of all the transactions conducted by Indrani or in the alternative damages.

The appellant's defence was twofold.

(1) That Menon was not entitled to the commission claimed under the Circular.

(2) That his claim was time barred.

The High Court dismissed Menon's claim based on the following findings.

(1) That his claim for overriding commission for the period prior to 8 April 1987, is time barred.

(2) If not time barred, there is no provision for overriding commission in the Agency and Supplementary Agreements.

(3) His claim for overriding commission after 8 April 1987, cannot be maintained as he did not assist Indrani in securing and servicing the group insurance schemes procured by Indrani.

(4) The appellant had not committed any breach of contract based on convention, custom and practice in the insurance trade to entitle Menon to claim damages against the appellant.

Menon took his case to the Court of Appeal which allowed his appeal and reversed the decision of the High Court after arriving at the following conclusions.

(1) That the Circular entitled him to claim overriding commission on the sale of a group insurance scheme transacted by Indrani.

(3) Although his claim arose more than six years prior to the filing of his suit, it was not time barred under s. 6(1)(a) of the Limitation Act 1953 ("the Act").

This court then granted leave to the appellant to pose two questions of law which read as follows:

(1) whether disparate obligations to pay from time to time arising upon the occurrence/fulfilment of contingent events, can be construed as a single continuing obligation so as to displace the effect of s. 6(1)(a) of the Limitation Act 1953, and

(2) whether the provisions of the Limitation Act 1953, cease to apply to breach of contract, where the parties remain in contractual relationship.

With regard to the first conclusion, the Court of Appeal was correct when it held that Menon was entitled to overriding commission as a DSO on the sale of a group policy insurance secured by Indrani in 1986. This is so as the Circular at para. II(A)(i) makes provision for the payment of overriding commission to an Immediate Superior at the rate 10% of the Group Scheme Agent's commission. That Immediate Superior can only be Menon as it was he who recruited Indrani as one of his subordinate agents into his unit.

On the issue of time bar, Menon had contended before the Court of Appeal that his cause of action for the purpose of s. 6(1)(a) of the Act, only arose after 16 July 1990, when he received a letter from the appellant informing him that it would not honour its obligation to pay his overriding commission for the group insurance policy transacted by Indrani. As such when he filed his civil suit in April 1993, he was well within the six year limitation period.

The Court of Appeal agreed with Menon but dealt with the matter in the following manner.

> In the present case we find the general rule governing the limitations of actions to have been displaced by a contrary intention evinced by the parties in this case. It was the intention of the parties here, we find, that the obligation to pay an overriding commission to the Plaintiff be a continuous one. Put another way, there was an obligation upon the Defendant to continuously pay overriding commission to the Plaintiff as and when they fell due. When that obligation was breached, its consequences flowed continuously and not from time to time. Such a continuous obligation as is found here therefore displaces the ordinary rule governing breach of contract. Accordingly, the Plaintiff's cause of action arose at least in 1990 when the Defendant informed him that it would not honour its continuing obligation. Alternatively, on a true construction of the Agreement, this is a contract to which no period of limitation applies for so long as the parties remain in contractual relationship ie, so far as the overriding commissions on group scheme policies are concerned.

I take issue with the Court of Appeal on this ruling as firstly it did not identify the specific evidence to establish the parties' intention that the obligation to pay overriding commission was a continuous one and not from time to time as and when payment became due. As the parties' relationship is strictly contractual, no reference was made by the Court of Appeal to any particular clause in any of the three agreements I have referred to, to show that the parties had agreed to prolong the obligation to pay to some date in the future. I have perused the three documents but cannot find any provision expressing such an intention on the part of the parties. As such there was no basis for the Court of Appeal to conclude that the obligation to pay overriding commission was a continuous obligation as the parties had intended it to be so.

In upholding Menon's contention that his claim was not time barred, the Court of Appeal treated the appellant's obligation to pay overriding commissions as and when they accrued from time to time as one continuous obligation that arose from the sales of such policies. The effect of such a finding is that time did not begin to run as and when each overriding commission is due to Menon but is postponed to some date in the future. The Court of Appeal then identified that date to be after 16 July 1990, when the appellant formally notified Menon that it was not going to pay him the overriding commission. Hence when Menon sued the appellant in 1993, he was well within the six year statutory limit.

In arriving at that finding, the Court of Appeal has completely rewritten the law of contract governing limitation of actions. Section 6(i)(a) of the Act provides that "actions founded on a contract shall not be brought after the expiration of six years from the date on which the cause of action accrued". The law on when a cause of action accrues is already well settled and very much entrenched in our jurisprudence which is this. A cause of action founded on contract accrues on the date of its breach and that time begins to run from that breach. See the case of *Nasri v. Mesah* [197] MLJ 32 which followed *Board of Trade v. Cayzer, Irvine & Co* [1972] AC 610.

Applying that general principle of law when did Menon's cause of action arise? It can only arise when the Appellant breached its obligation to pay. When did that obligation to pay arise? That obligation arose the moment the appellant received the cash premium due on the sale of the group insurance scheme transacted by Indrani. As the obligation to pay also triggers Menon's entitlement to be paid, cl. 5 of the Agency Agreement becomes very relevant as it spells out Menon's entitlement to overriding commission with the following provisions.

> The Agent's remuneration shall be by way of commission … Such commission shall only be payable on cash premiums **actually charged and received** by the Company during the currency of this Agreement … (emphasis added).

It is not disputed that the premiums payable to the appellant on the one group insurance scheme secured by Indrani in 1986 had already been received by the appellant in the same year and it was upon receipt of this premium that the appellant's obligation to pay arose as well as Menon's entitlement to be paid. When demand was made by Menon, the appellant refused payment, thereby breaching its obligation to pay and it is at that point of time that time begins to run. Calculating the six year time bar from 1986 when Menon's cause of action arose until 1993, when Menon filed his claim in court, clearly his claim has become time barred.

Of course it is open to the parties to regulate or modify their rights in the event of a breach in any way they think fit, but the bottom line is still the interpretation to be given to the terms of a particular contract.

One such case is found in the decision of the Privy Council in *Loh Wai Lian v. S.E.A. Park Housing Corporation Sdn Bhd* [1987] 2 MLJ 1, which was relied upon by the Court of Appeal. That case dealt with a contract between a housing developer and a purchaser under the Housing Developer (Contract and Licensing) Rules 1970 where two of the terms specify the date of the completion of the house whilst the other the developer's obligation to indemnify the purchaser for any loss suffered in the event there has been a delay in the delivery of the house for occupation. In such an event, the loss suffered shall be calculated at a specified rate from the date when possession ought to have been given until the date when possession was in fact given. Although this court agreed with the High Court that the purchaser's claim was time barred, the Privy Council held that since the parties had agreed to a single aggregate sum which could not be calculated until the house was completed and handed over, time did not run until that date. By the agreement the breach had been shifted from the date the house was to be completed to a date when the house was actually handed to the purchaser.

Unlike *Loh Wah Lian*, there is no contractual modification or alternation in any of the contracts binding Menon to the appellant that can be relied upon to shift the time of breach to some time in the future. In the absence of such modification or alteration, the general principle of law that time begins to run from the date of breach applies. Thus from the very nature of the contracts that Menon had with the appellant, it cannot be said that the obligation to pay overriding commission is a continuous one and that it had the effect of displacing the general law governing the limitation of actions.

In the circumstances of this appeal, all that the appellant is obliged to do is to pay the overriding commissions from time to time to Menon as and when they became due. They became due as and when the appellant received the premiums due on group insurance schemes successfully transacted by Indrani. Such obligations are disparate obligations that arise at different times and with each breach there arises a complete and distinct cause of action in itself and time begins to run immediately upon every successive breach. As such had Indrani secured say three group insurance schemes at different times, the appellant would breach its obligations to pay if it refused payment on the receipt of each premium due at differing times on the three group insurance schemes. Such breaches occurring at different times, I say, cannot be merged into one continuing obligation as suggested by the Court of Appeal.

The Court of Appeal had also reached an alternative finding that so long as the parties remain in contractual relationship no period of limitation exists. This is again another attempt at creating uncertainty in the law governing limitation of actions as the effect of such a finding is to leave open the calculation when time begins to run. This cannot be right as there is no basis for such a finding as the Act itself has already set down the time table as to when time begins to run for the purpose of computing limitation periods.

Finally as Menon's entitlement to overriding commission is governed by the Circular which came into effect on 1 January 1987, his claim is not maintainable as it relates to the sale of a group insurance scheme sold in 1986. This the Court of Appeal failed to consider.

For the reasons appearing in this judgment the two questions posed to this court are replied in the negative and consequently this appeal is allowed with costs and the deposit is to be refunded to the appellant.

My brother judges, Steve Shim Lip Kiong, CJSS and Abdul Hamid Mohamed, FCJ, who have had sight of this judgment in draft agree to the conclusions that I have reached.